IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

SA.No. 259 of 1993()

(AGAINST THE DECREE AND JUDGMENT DATED 18/01/1992 IN AS.23/1988 OF THE IST ADDL.SUB COURT,ERNAKULAM REVERSING THE DECREE AND JUDGMENT DATED 11/08/1987 IN OS.172/1982 OF THE PRINCIPAL MUNSIFF'S COURT, ERNAKULAM)

.....

APPELLANTS/RESPONDENTS4 TO 6 AND 8/DEFENDANTS 2,4 TO 6 AND 8:

----

1. **ABDULKHADER, S/O.AHAMMED, KARUVELIL HOUSE, RESIDING AT VALIYAPARAMBU, VATTEKKUNNAM KARA, THRIKKAKARA NORTH VILLAGE.**

2. **ASSAINAR, S/O.KOCHU MOHAMMED, RESIDING AT VALATH HOUSE, PUTHUPPALLIPRAM KARA, THRIKKAKARA NORTH VILLAGE.**

3. **MOHAMMED KUNJU, S/O.HYDROSE, CHAYIMOOLAYIL, PALLITHAZHAM, VATTEKKUNNAM KARA, ...DO....**

4. **MOHAMMED ALI ALIAS MAMMI, THADATHIL HOUSE, VALIYAPARAMBU, NEAR TOLL GATE, VATTEKUNNAM KARA, THRIKKAKARA NORTH VILLAGE.**

5. **SULAIMAN, S/O.KUTTY, ANJIKKATHU HOUSE, PUTHUPPALLIPARAM KARA, ..DO...**

BY ADV. SRI.ANANTHASUBRAMANIAN

S.A.NO.258/1993

RESPONDENTS:APPELLANT AND RESPONDENTS 3 & 7/PLAINTIFF AND DEFENDANTS 3 AND 7:

----

1. ABOOBACKER, S/O.KARIAPPILLIL VEERAN, PROPRIETOR, KARIAPPILLY COCONUT PRODUCTS, KALAMASSERY, RESIDING AT NEDUMPURATH HOUSE, VATTEKKUNNAM KARA, THRIKKAKARA NORTH VILLAGE.

***2. A.A.HAMEED, CHAIRMAN, B.D.C. EDAPPALLY BLOCK, RESIDING AT EDAVALATH HOUSE, .DO....**

***3. MOHAMMED ALIAS BAKKER, S/O.BAVA, KALLEPPURATH, PALAKKAMUTTAM, PUTHUPPALLIPRAM KARA, ...DO..**

(*R2 AND R3 REMOVED FROM THE PARTY ARRAY AS PER ORDER DATED 20/10/1994 ON C.M.P.NO.1619/94.)

BY ADV. SMT.T.D.RAJALAKSHMI

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

==========

S.A. NO. 259 OF 1993

==========

Dated this the 26th day of July, 2007

JUDGMENT

Defendants 2, 4 to 6 and 8 in O.S.172/1982 on the file of Munsiff Court, Ernakulam are the appellants. First respondent is the plaintiff. Though other defendants were impleaded as respondents 2 and 3, subsequently appellant deleted them as they did not claim any right in the property.

2. First respondent instituted the suit seeking a decree for permanent prohibitory injunction restraining appellants from trespassing into the plaint schedule property contending that he is the owner in possession of plaint schedule properties under Ext.A1 partition deed and Ext.A2 gift deed. First respondent contended that plaint schedule properties are lying contiguous and respondents have no manner of right or possession and the National High Way is lying to the east of

the plaint schedule properties and appellants attempted to trespass into the plaint schedule properties and cut open a road through the plaint schedule property connecting National High Way and they have no right to do so and no way exist through the plaint schedule property and therefore appellants are to be restrained by a permanent prohibitory injunction from trespassing into the plaint schedule property. Appellants in their written statement contended that a continuous pathway part of which is a road and the remaining part broad varamba running several kilometres long, exists from time immemorial and that pathway crosses the Ernakulam-Alwaye railway track and proceeds eastward crossing the National Highway and portion of the pathway lies between the railway track and the National Highway and the attempt of the first respondent is to obstruct the public road available and existence of the road is suppressed and first respondent is therefore not entitled to the decree sought for.

3. Trial court appointed a Commissioner and PW2 Commissioner submitted Exts.C1 report and C1(a) plan showing the existence of a way through the plaint schedule properties reaching the eastern National Highway. On the evidence of Pws.1 and 2 and Dws. 1 to 4 and Exts.B1 to B10, C1 and (a) and X1, learned Munsiff found that first respondent has right and possession to the property obtained under Ext.A1. But on the evidence it was found that appellants failed to establish the dedication of a public way running through the plaint schedule properties. But relying on the evidence, learned Munsiff found that the suit was instituted suppressing the true facts and existence of the way and in such circumstance, first respondent, who has not come to the court with clean hands, is not entitled to the discretionary relief of a decree for injunction. Suit was dismissed. First respondent challenged the decree and judgment before First Additional Sub Court, Ernakulam in A.S.23/1988. Learned Sub Judge on reappreciation

of evidence confirmed the finding of learned Munsiff that dedication of any portion of the plaint schedule property as a way was not established. Learned Sub Judge then found that as public way by dedication was not established and right and title of first respondent over the plaint schedule properties was established, first respondent is entitled to the decree for injunction. A decree for permanent prohibitory injunction was granted. It is challenged in the second appeal.

4. Appeal was admitted formulating the following substantial questions of law.

1) In a suit for injunction alleging threat of interference with exclusive right to possession by cutting a new pathway, setting up a case of non-existence of pathway is it not the burden of the plaintiff to prove his possession and absence of a pathway on the date of the suit?

2) When the plaintiff suppressed existence of the pathway through his property and user of it by

general public, was first appellate court justified in interfering with the decree for permanent prohibitory injunction refused by the trial court under section 41(i) of Specific Relief Act?

5. Learned counsel appearing for appellants was heard. First respondent though appeared through a counsel subsequently did not appear. Learned counsel appearing for first respondent submitted that inspite of notice first respondent did not give necessary instruction.

6. The right and possession of first respondent to the property covered under Ext.A2 was not disputed. The only case set up by the appellants was a right of way through the plaint schedule properties. What was contended was that there exists a pathway through the plaint schedule properties from time immemorial which connects the western properties and the eastern National Highway. It was contended that the way, portion of which was partly road and partly varamba before

1960 was thereafter made into a public road after changing the position of the road and first respondent intentionally suppressed the existence of the road and first respondent is not in possession of the road portion of the property and therefore he is not entitled to the decree granted by the first appellate court. It was argued that when the trial court found that first respondent instituted the suit suppressing true facts and so not entitled to the discretionary relief, first appellate court should not have interfered with that discretion rightly exercised by the trial court and therefore first respondent is not entitled to the decree sought for.

7. On going through the evidence and judgments of the courts below, it is absolutely clear that first respondent instituted the suit suppressing the true facts. What was contended by first respondent in paragraph 3 of the plaint was that " at no point of time there existed a pathway through the plaint schedule property". The report of the

Commissioner establish that it was false. In Ext.C1 report Commissioner reported that he entered the plaint schedule properties from the eastern National Highway through the eastern gate and he could find the disputed pathway which is distinct and it leads to the gate on the western extremity and runs further to the west upto Ernakulam-Alwaye railway track lying north-south and the length of the pathway through the plaint schedule properties is about 104 metres and on the northern side of the pathway, in the plaint schedule property is the southern boundary of the factory of the respondent. The Commissioner also reported that the entire pathway, from the National Highway upto the railway track is about ½ a kilometer at length and the pathway is having a width of 4.30 meters, 3.70 meters, 3.85 meters and 5.30 meters at different places as marked in the sketch. The Commissioner also reported that he could find that the pathway is in regular use by the public and he found men, women and children passing through the

pathway and could see tracks of lorry at several places. The Commissioner further stated that from the appearance of the pathway, it is clear that the pathway is a very old pathway and used by the people from the western side of the railway track to enter the National Highway. It is on this basis, learned Munsiff held that first respondent suppressed the true facts and sought a decree for injunction.

8. From the evidence, it is absolutely clear that a pathway was existing which was being used by the public, when the suit was filed. In such circumstance, first appellate court should not have interfered with the discretion exercised by the trial court. When a suit is instituted seeking a discretionary relief for injunction and it is proved that plaintiff has not approached the court with clean hands and suppressed true facts and suggested false case, the denial of the discretionary relief is perfectly justified. First appellate court should not have interfered with the

discretion rightly exercised as provided under section 41(a) of Specific Relief Act.

Second appeal is therefore allowed. The decree and judgment passed by the Sub Court, Ernakulam in A.S.23/1988 is set aside. The suit stands dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.259 /93

JUDGMENT

26th JULY, 2007